(1) 95-1216

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DENNIS COOK, TONI COOK,
JEFFREY BRIAN COOK and JENNIFER ROSE SMITH,
Petitioners,

v.

CITY OF CINCINNATI,
RONALD FLENDER, and DAVID WADDELL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED

I. ON APRIL 5, 1986, WAS THERE A CLEARLY ESTABLISHED RIGHT UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO PROTEST ON A PUBLIC SIDEWALK AND TO SPEAK OUT IN A REASONABLE MANNER AGAINST ABORTION?

II. WHEN THERE IS CLEARLY ESTABLISHED LAW GOVERNING A CLAIMED CONSTITUTIONAL VIOLATION, IS SUMMARY JUDGMENT INAPPROPRIATE WHEN DIFFERENT VERSIONS OF THE FACTS CREATE A DISPUTE AS TO WHETHER A CONSTITUTIONAL VIOLATION EVEN OCCURRED?

III. EVEN IN THE ABSENCE OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS, SHOULD QUALIFIED IMMUNITY BE GRANTED TO POLICE OFFICERS WHO VIOLATE RIGHTS IN AN OBJECTIVELY MALICIOUS, OPPRESSIVE AND UNREASONABLE MANNER?

PARTIES TO THE PROCEEDING

Petitioners: Dennis Cook, Toni Cook, Jennifer Rose Smith, and Jeffrey Brian Cook

Respondents: City of Cincinnati, Ronald Flender and David Waddell

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

Dennis Cook, Toni Cook, Jennifer Rose Smith and Jeffrey Brian Cook respectfully petition for a writ of certiorari to review the judgment of the Hamilton County Court of Appeals, First Appellate District of Ohio, which affirmed the granting of Summary Judgment to Respondents by the Hamilton County Court of Common Pleas.

OPINIONS BELOW

The published opinion of the Hamilton County Court of Appeals, First Appellate District of Ohio, for which review is sought is *Cook v. City of Cincinnati* (1995), 103 Ohio App.3d 80. The slip opinion in Case No. C-930876 was dated May 31, 1995 [Appendix C, pp. 5a-18a]. An appeal to that Court was taken by Petitioners on November 2,1993 from the Final Judgment Entry (unreported) of the Hamilton County, Ohio, Court of Common Pleas, Case No. A-8702588 [Appendix D, pp. 19a-21a].

JURISDICTION

Jurisdiction is conferred in this case pursuant to 28 U.S.C. §1257(a). The First Appellate District of Ohio affirmed the judgment of the Hamilton County Court of Common Pleas on May 31, 1995. The Supreme Court of Ohio denied review of the judgment of the First Appellate District of Ohio on November 1, 1995. [Appendix B, p. 4a]

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in Appendix A, pp. 1a-3a, are U.S. Const. Amendment I, U.S. Const. Amendment IV, U.S. Const. Amendment XIV, Section I, 42 U.S.C. §1983, Ohio Revised Code 2917.11(A)(2), Ohio Civ.R. 56(C).

STATEMENT OF THE CASE

Petitioner's federal claims were asserted below pursuant to 42 U.S.C. §1983 and were based upon violations of their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

A. Evidence Supporting Police Officer Liability.

On April 5, 1986, Plaintiff Dennis Cook ("Cook") was picketing and speaking out against abortion in front of a Planned Parenthood abortion clinic in Cincinnati, Ohio. Fifty or more other protestors were also present and very peaceful prior to the unwarranted police intervention described below. The clinic was located a mere 12 feet from the public sidewalk in a noisy, heavily travelled business section of the city. Cook was accompanied by his two minor children, Jeffrey Brian Cook and Jennifer Rose Smith, ages 10 and 11. At all times during his protest, Cook remained on the public sidewalk and spoke out against abortion in a reasonable manner. His speech was such that even a passing city bus would drown out his voice.

At approximately 10:00 a.m. Respondents Ronald Flender and David Waddell, City of Cincinnati police officers, arrived and told Cook that they would issue him a citation if he did not shut up. Believing that he was acting lawfully, Cook continued speaking out as women entered the clinic. Flender and Waddell then arrested Cook, handcuffed him, and took him to jail. As Cook was being led to the police cruiser, he pleaded with Flender and Waddell to make provisions for his two children. Flender and Waddell responded by saying that the children were Cook's problem, and made no provisions for their well-being. When another protestor (a a stranger to the Cooks) heard Cook's plea and stepped forward from the crowd to offer care for Cook's children, one of the officers threatened her in such manner that she feared arrest. She left the scene without ever finding the Cook children, who witnessed their father's arrest and were weeping in great distress. The children were comforted and ultimately transported to their

home (miles away) by other pro-life protestors likewise unknown to the Cook family at the time.[1]

Waddell subsequently filed a criminal charge against Cook for Disorderly Conduct (R.C. §2917.11). On August 26, 1986, Cook was acquitted of the charge in the Hamilton County Municipal Court.

B. Evidence Supporting City Liability.

The record in this case contains substantial evidence of a longstanding policy or custom among City of Cincinnati ("City") Police Officers of effecting warrantless arrests of pro-life protestors at abortion clinics, which were inevitably followed by acquittals at trial and no investigation or discipline of police conduct even after complaints of intentional torts and/or litigation alleging police wrongdoing. Indeed, there is substantial evidence of ratification by the City of this "custom" of harassing lawful pro-life protestors.

However, because neither of the lower courts even reached this issue, Petitioners will not brief it in this Petition. Petitioners suggest that should this Court accept jurisdiction and remand this case for trial, the municipal liability issue should be remanded along with the merits of the constitutional issues.

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[1] Respondents will offer a remarkably different version of the facts, some of which are alluded to in the Court of Appeals' Opinion. [See App. 6a, 9a] These differences only highlight why summary disposition of this case, on qualified immunity grounds, was wrong.

C. Action in the Hamilton County Court of Common Pleas.

On April 3, 1987 Petitioners Dennis J. Cook, Toni Cook, Jennifer Rose Smith, and Jeffrey Brian Cook (collectively "Petitioners" or "the Cooks") filed a Complaint, later amended, in the Hamilton County Court of Common Pleas, seeking damages against Respondents City of Cincinnati, Ronald Flender and David Waddell for violations of their federal constitutional rights pursuant to 42 U.S.C. §1983, and for the commission of various intentional torts under Ohio law. On January 22, 1992, Respondents filed a Motion for Summary Judgment on all counts, which the Trial Court granted on November 2, 1993. The Trial Court's decision, as reflected in its Final Judgment Entry [App. 19a-21a] was based entirely on the doctrine of qualified immunity, both for the police officers and for the City.

D. Decision of the Court of Appeals.

On November 17, 1993, Petitioners filed a Notice of Appeal to the Hamilton County Court of Appeals, First Appellate District of Ohio [hereinafter "Court of Appeals"]. After oral argument, the Court of Appeals requested supplemental memoranda from the parties on the following question:

> Can the issue of qualified immunity be determined as a matter of law on a 42 U.S.C. Section 1983 claim if the underlying facts are disputed?

The Court of Appeals subsequently affirmed the judgment of the Trial Court in a published opinion on May 31, 1995. The reasoning of the Court of Appeals can be summarized as follows:

a) The Respondent police officers are entitled to qualified immunity from Cook's First and Fourth Amendment claims because Cook had no clearly established right to protest as he did on April 5, 1986.

b) The Respondent police officers are entitled to qualified immunity from the Fourteenth Amendment claims of Dennis Cook, Jeffrey Brian Cook (son) and Jennifer Rose Smith (daughter) because there was no clearly established right prohibiting the "conscious-shocking abuse of police power" alleged in this case;

c) Respondent City of Cincinnati had no liability because there was no constitutional violation at all. The Court of Appeals never reached the question of whether a city policy or custom could have caused the violations alleged.

On July 17, 1995, Petitioners filed a Notice of Appeal and a Memorandum In Support Of Jurisdiction seeking review by the Supreme Court of Ohio. On November 1, 1995, the Supreme Court of Ohio issued an Entry denying further review.

E. Stage of Proceedings Where Federal Questions Raised.

1. Before the Hamilton County Court of Common Pleas, Petitioners asserted their First, Fourth and Fourteenth Amendment claims pursuant to 42 U.S.C. §1983 in their original Complaint (filed 4/3/87), in their First Amended Complaint (filed 12/23/91), and in their Response to Defendants' [Respondents'] Motion For Summary Judgment (filed 1/22/93). Petitioners argued against the application of qualified immunity in their memorandum opposing summary judgment. The Trial Court granted summary judgment to Respondents on all counts

on the basis of qualified immunity and without deciding the merits of the constitutional issues.

2. Before the First Appellate District of Ohio, Petitioners pursued their claims against the police officers by presenting the following issues:

> a. DEFENDANTS FLENDER AND WADDELL ARE NOT ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THE FEDERAL 1983 CLAIMS BECAUSE THERE ARE MATERIAL ISSUES OF FACT GOING TO THE ESSENTIAL ELEMENTS OF PLAINTIFFS' CLAIMS.
>
> b. DEFENDANTS FLENDER AND WADDELL ARE NOT ENTITLTED TO QUALIFIED IMMUNITY BECAUSE THEIR CONDUCT WOULD BE VIOLATIVE OF CLEARLY ESTABLISHED LAW WHEN THE EVIDENCE IS CONSTRUED MOST FAVORABLY TO THE PLAINTIFFS.

Supplemental authority was also provided to the Court of Appeals raising the specific arguments contained in this petition.

3. Before the First Appellate District of Ohio, Petitioners pursued their claims against the City of Cincinnati by presenting the following issues:

> a. THE CITY OF CINCINNATI IS NOT ENTITLED TO QUALIFIED IMMUNITY UNDER FEDERAL LAW.
>
> b. THE CITY OF CINCINNATI IS LIABLE UNDER §1983 FOR THE CONDUCT OF FLENDER AND WADDELL BECAUSE THEY ACTED IN ACCORDANCE WITH THEIR TRAINING AND INSTRUCTIONS AS CITY POLICE OFFICERS.
>
> c. THE CITY OF CINCINNATI IS LIABLE UNDER §1983 FOR THE CONDUCT OF FLENDER AND WADDELL BECAUSE IT HAS RATIFIED THEIR CONDUCT BY ITS ACTIONS AND OMISSIONS IN THIS CASE AND IN THE FACE OF A WELL ESTABLISHED CITY POLICY AND/OR CUSTOM OF ARRESTING AND INTERFERING WITH PRO-LIFE PROTESTORS WITHOUT A WARRANT AND WITHOUT PROBABLE CAUSE.

The Court of Appeals upheld the judgment of the Trial Court by finding that no constitutional violation had occurred, or by granting qualified immunity for lack of clearly established law.

4. Before the Supreme Court of Ohio, Petitioners pursued their claims against Respondents by presenting the following propositions of law:

> a. IT WAS CLEARLY ESTABLISHED LAW ON APRIL 5, 1986 THAT REASONABLE POLITICAL SPEECH ON PUBLIC SIDEWALKS IS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.
>
> b. EVEN IF A CONSTITUTIONAL RIGHT IS NOT CLEARLY ESTABLISHED AT THE TIME OF A VIOLATION, POLICE OFFICERS WILL NOT BENEFIT FROM QUALIFIED IMMUNITY WHEN THEIR CONDUCT IS OBJECTIVELY UNREASONABLE AND EGREGIOUS.

The Supreme Court of Ohio denied review on November 1, 1995.

REASONS FOR GRANTING THE PETITION

I.

ON APRIL 5, 1986 THERE WAS A CLEARLY ESTABLISHED RIGHT UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION TO PROTEST ON A PUBLIC SIDEWALK AND TO SPEAK OUT IN A REASONABLE MANNER AGAINST ABORTION.

II.

WHEN THERE IS CLEARLY ESTABLISHED LAW GOVERNING A CLAIMED CONSTITUTIONAL VIOLATION, SUMMARY JUDGMENT IS INAPPROPRIATE WHEN DIFFERENT VERSIONS OF THE FACTS CREATE A DISPUTE AS TO WHETHER A CONSTITUTIONAL VIOLATION EVEN OCCURRED.

Because of the manner in which this case was decided below, the two propositions of law listed above will be argued together.

A. Introduction

Petitioner Dennis Cook comes before this Court as a card-carrying member of that "currently disfavored class of antiabortion protestors", *Lawson v. Murray*, ___ U.S. ___ , 115 S.Ct. 2264, 132 L.Ed.2d 269 (1995) (Scalia, J.) (concurring in denial of certiorari). As such, he knows that even the precious right of free speech can be arbitrarily denied him at any time. This case is a legal atrocity, which illustrates that problem.

By granting summary judgment to the Respondents in this case, the lower courts have abandoned the proper standard of review for summary judgment, used the doctrine of qualified immunity to protect lawless police officers acting as malicious bullies, and emasculated clearly established principles of free speech.

Unfortunately for Petitioners, this proposition of law presents no novel issue for this Court to decide. To the contrary, it requires this Court to enforce in the State of Ohio fundamental principles of free speech which have been so clearly set forth in its past decisions. Indeed, the First Amendment principles violated in this case are so straightforward that this Court should assume jurisdiction, *summarily reverse* the judgment of the Court of Appeals, and remand this case for trial.

B. Qualified Immunity

Qualified immunity is an affirmative defense which shields government officials performing discretionary functions from civil liability under §1983 for allegedly unlawful conduct. *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but . . . in light of pre-existing law the unlawfulness must be reasonably apparent. *Anderson v. Creighton* (1986), 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523.

Summary judgment is not to be granted on the issue of qualified immunity if there are factual disputes central to the issue. As the U.S. Court of Appeals for the Sixth Circuit stated:

> [S]ummary judgment would not be appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the Defendant did acts that violate clearly established rights . . . .

Poe v. Hayden, 853 F.2d 418, 426 (6th Cir. 1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989). This is the precise principle which governs this case, it was provided by Petitioners to the Court of Appeals in the aforementioned supplemental memorandum, and the Court of Appeals still affirmed the Trial Court's summary disposition.

The Court of Appeals' mistake is obvious from its Opinion, which muddled the distinction between clearly eztablished law (discussed below) and clearly established facts (of which there are virtually *none* in this case). One fact that is clear in this case is that the arresting police officers were both present during, and claimed to witness, Dennis Cook's "disorderly" conduct. See footnote one of Court of Appeals Opinion [App. 9a], which shows police testimony in direct conflict with Cook's [App. 22a-24a].

Yet, elsewhere the Court of Appeals postured the case as if the police did not know the facts but "arrived to find a volatile situation with conflicting reports of what was going on. . . ." [App. 9a-10a] This distortion of the facts allowed the Court of Appeals to posture the police as innocent arbiters of a factual dispute, rather than parties to it, which is what they clearly were. It may be unclear to the Court what the true facts were, but Cook and the arresting officers know exactly what happened. Either Cook or the arresting officers have committed perjury in this case. Whatever the case, while this is the exact type of factual dispute which requires a trial, it has no bearing whatsoever on whether there was clearly established law governing Cook's version of the facts, which is the only version that matters in this summary judgment proceeding. Ohio Civ.R. 56(C); *Hounshell v. American States Ins. Co.,* 67 Ohio St.2d 427, 433, 424 N.E.2d 311 (1981). If a state court of appeals can mis-

apply the law to disputed facts so badly in a case like this, the qualified immunity process cries out for further clarification from this Court.

C. Clearly Established First Amendments Rights.[2]

Pursuant to Ohio Civ.R. 56(C), this issue must also be decided on the assumption that Dennis Cook's version of the facts are true, and that he did nothing more than to protest and speak out against abortion in a reasonable manner from the public sidewalk. See Affidavit of Dennis Cook, Appendix E, pp. 22a-24a.

The Court of Appeals' conclusion that the law governing Cook's conduct was not clearly established in 1986 is impossible to justify in view of existing First Amendment law. The protection accorded to free speech and assembly on public streets and sidewalks has always been sweeping. The classic statement of the law relating to a traditional public forum was established more than 50 years ago in *Hague v. C.I.O.* (1939), 307 U.S. 496, 515-16, 59 S.Ct. 954, 83 L.Ed. 1423:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

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[2]Petitioner Dennis Cook's Fourth Amendment claims rise and fall with the First Amendment claims. If Cook's speech was protected, there would be no probable cause to support a warrantless arrest for Disorderly Conduct. Both are fact questions for a jury.

This principle was applied in a very concrete fashion just three years prior to Cook's arrest in *U.S. v. Grace* (1983), 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736, where this Court struck down restrictions on peaceful picketing on the public sidewalks surrounding the Supreme Court building:

> . . . [P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidwalks, and parks, are considered, without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leace open ample alternative channels of communication."

Accord *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794, 804 (1983).

Compare this case with *Edwards v. South Carolina* (1963), 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, where "breach of the peace" convictions of 187 individuals were reversed on First Amendment grounds. The *Edwards* defendants had engaged in "boisterous, loud and flamboyant conduct" which included "a religious harangue" and "loudly singing patriotic and religious songs, while also stomping their feet and clapping their hands". While conceding that the conduct of the *Edwards* defendants violated state law, this Court nevertheless reversed the convictions because the state law infringed upon constitutionally protected rights of free speech, free assembly and freedom to petition for redress of grievances. *Id.* at 233-235. Surely, the conduct of

Dennis Cook, acting alone, is governed by the same public forum principles.

Against this backdrop, it would appear that the Court of Appeals went out of its way to rule against Cook. First, it shot down an argument which Cook never made: ". . . the proposition that in April 1986, he had an absolute right to engage in any kind of expressive conduct or speech around an abortion clinic, as long as he stayed on the sidewalk." (App. 13a) Of course, Cook never advocated such a patently meritless argument.

Second, the Court of Appeals found [App. 13a] that "the 'contours of the law' in this contentious area were not clearly settled until 1994 in *Madsen v. Women's Health Ctr., Inc.* (1994), 512 U.S. ___ , 114 S.Ct. 2516, [129 L.Ed.2d 593]." The Court of Appeals did not explain what *Madsen* established so clearly, or how it affects this case at all. *Madsen* involved a civil injunction, imposed only after specific findings of wrongdoing by protestors, 129 L.Ed.2d 593, 607, n.2, a situation quite different from criminally prosecuting, under a generally applicable, content neutral ordinance, an innocent individual.

Finally, the Court of Appeals cited *Beth Israel Hospital, Inc. v. NLRB* (1978), 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 and *NLRB v. Baptist Hospital, Inc.* (1978), 442 U.S. 773, 99 S.Ct. 2598, 61 L.Ed.2d 251, apparently to demonstrate the legitimacy of noise control regulations around medical facilities. However, Cook does not quarrel with that principle, nor is there any evidence in this record to suggest that Cook was even protesting in a noise-restricted zone. Indeed, both of those cases involved union organizing inside of the hospitals and are not remotely applicable to Dennis Cook's speech in a "traditional public forum".

In this case, the Court of Appeals applied qualified immunity principles erroneously and in conflict not only with this Court's long-standing First Amendment precedents, but also with the standard used in the Sixth Circuit to deny summary judgment when factual disputes prohibit it.

III.

EVEN IN THE ABSENCE OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS, QUALIFIED IMMUNITY SHOULD NOT BE GRANTED TO POLICE OFFICERS WHO VIOLATE RIGHTS IN AN OBJECTIVELY MALICIOUS, OPPRESSIVE AND UNREASONABLE MANNER.

Without deciding whether the Cooks had established meritorious 14th Amendment due process claims, the Court of Appeals upheld summary judgment for the Respondents on the theory that there was no clearly established law governing those claims either.

Substantive due process violations finds their roots in *Rochin v. California* (1952), 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183, where the United States Supreme Court established that the 14th Amendment's Due Process Clause can be violated when police conduct "shocks the conscience", regardless of whether a more specific provision of the Bill of Rights is also violated. This standard was first applied to §1983 actions in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) and has since been recognized throughout the federal circuits. As this Court has stated more recently:

> [T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

The malicious abandonment of Cook's two minor children not only gives rise to such a "shocks the conscience" claim, but also violated the children's liberty under the Due Process clause. See *Ingraham v. Wright* (1977), 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711 (due process right "to be free from, and to obtain judicial relief for unjustified intrusions on personal security"). Accord *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979) (abandonment of children in car after arrest of driver).

Like the First Amendment issue, the Court of Appeals never reached the merits of these constitutional issues because if found no "clearly established law" sufficient to defeat qualified immunity. However, an award of qualified immunity under such circumstances subverts the very principles upon which the qualified immunity doctrine is founded.

"Objective legal reasonableness" is the touchstone of the qualified immunity determination. *Anderson v. Creighton,* 483 U.S. 635, 639, 97 L.Ed.2d 523, 530, 107 S.Ct. 3034 (1986). How can this standard be compatible with objectively outrageous conduct? The Seventh Circuit addressed the problem directly and with irrefutable logic:

> . . . [T]hat no precisely analogous case exists does not defeat [plaintiff's] claim. It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that had not previously arisen because the behavior alleged is so egregious that no like case is on the

> books. As we recognized in *K.H. ex rel. Murphy,* 914 F.2d at 851, "The easiest cases do not even arise. There has never been a section 1983 claim accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune . . . because no previous case had found liability in those circumstances.

McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992)

Can police officers "shock the conscience" with inherently unreasonable, deliberately hurtful conduct, yet still enjoy qualified immunity? The disposition of this case by the Ohio courts, which were presented with this precise argument and authority, is implicitly at conflict with the Seventh Circuit on this point. It is a terribly important and interesting question which this Court should answer. Until this Court answers it, government actors will continue to escape liability for their most oppressive conduct.

CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition For Writ Of Certiorari be granted.

Respectfully submitted,

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January 30, 1996

APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

OHIO REVISED CODE

§2917.11 Disorderly Conduct

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

* *

(2) Making unreasonable noise or offensively coarse utterance, gesture or display, or communicating unwarranted and grossly abusive language to any person;

(History: 134 v H511. Eff.1-1-74)

OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(C) Motion and proceedings thereon. The motion shall be served at least 14 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusions and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be issued on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX B

THE SUPREME COURT OF OHIO

1995 TERM

To wit: November 1, 1995

Case No. 95-1435

Dennis J. Cook, Toni Cook, Jennifer Rose Smith and Jeffrey Brian Cook,

Appellants,

v.

City of Cincinnati,
Ronald Flender and David Waddell,

Appellees.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Thomas W. Condit, Esq.

(Hamilton County Court of Appeals; No. C930876)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

[Filed May 31, 1995]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-930876
Trial No. A-8702588

DENNIS J. COOK, TONI COOK,
JENNIFER ROSE SMITH and JEFFREY BRIAN COOK,
Plaintiffs-Appellants,

vs.

CITY OF CINCINNATI,
RONALD FLENDER and DAVID WADDELL,
Defendants-Appellees.

OPINION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: May 31, 1995

Condit & Dressing Co., L.P.A., and Thomas W. Condit, Esq., No. 0041299, 5041 Oaklawn Drive, Cincinnati, Ohio 45227, for Plaintiffs-Appellants,

Fay D. DuPuis, Esq., No. 0020782, and Julie F. Bissinger, Esq., No. 0012055, Room 214 City Hall, 801 Plum Street, Cincinnati, Ohio 45202, for Defendant-Appellee City of Cincinnati,

Hardin & Hill and Donald E. Hardin, Esq., No. 0022095, Suite 520, The Grand Baldwin, 655 Eden Park Drive, Cincinnati, Ohio 45202, for Defendants-Appellees Ronald Flender and David Waddell.

MARIANNA BROWN BETTMAN, J.

This appeal arises out of events which took place on April 5, 1986, on or around the Margaret Sanger Center, a women's health clinic which, among other things, performed abortions. Plaintiff-appellant Dennis Cook ("Cook") was picketing at the Sanger Center that day along with his two minor children. Two Cincinnati police officers, Ronald Flender ("Flender") and David Waddell ("Waddell"), were called to the Sanger Center to investigate a complaint of disorderly conduct. The facts thereafter are sharply disputed.

According to the affidavits of Cook and other abortion protestors present that day, Cook limited his protesting to the public sidewalk and was doing nothing more than speaking forcefully against abortion. According to the sworn statement of Debra Lee Jackson, the head escort for Planned Parenthood, who was also at the Sanger Center that day, Cook was on the private property of the clinic and was yelling loudly, directly into the window of the waiting room, and was disturbing and upsetting the patients. It was Jackson who called the police.

Cook was arrested and charged with disorderly conduct. He was removed from the scene. His children were left at the scene and later brought home by another protestor. In a bench trial in municipal court, Cook was subsequently acquitted of the disorderly conduct charge. Cook, his wife and their two children then filed a lawsuit, which is the subject of this appeal, against the city of Cincinnati ("the city") and officers Waddell and Flender

("the police officers") individually and in their official capacities.

Cook's lawsuit has several components. Cook and his family allege violation of Section 1983, Title 42, U.S. Code against the city, and against the police officers in their individual capacities ("the 1983 claims"). They also allege a number of state-law tort claims, particularly battery, false arrest, false imprisonment, malicious prosecution and intentional infliction of emotional distress ("the state tort claims"). Mrs. Cook alleges loss of consortium as a result of all the foregoing.

The trial court granted summary judgment to all defendants on all claims. This appeal followed. Based upon the analysis set forth below, we affirm the judgment of the trial court.

We begin with Cook's first and third assignments of error, which involve the 1983 claims.

In his first assignment of error, Cook argues that the trial court erred in granting summary judgment to the police officers on his 1983 claims. We disagree. Section 1983 of the Civil Rights Act of 1871, as amended, Section 1983, Title 42, U.S. Code, provides a remedy to persons whose federal rights have been violated by government officials. Section 1983 does not encompass official conduct that violates only state law; rather the statute is limited to deprivations of federal constitutional and statutory rights. *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92, 637 N.E.2d 306, 309; *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 116, 585 N.E.2d 407, 410.

To establish a 1983 claim against an individual public official, two elements are required: (1) the conduct complained of must be committed by a person acting under

color of state law, and (2) the conduct must deprive the plaintiff of a federally protected right, either constitutional or statutory. *Gomez v. Toledo* (1980), 446 U.S. 635, 100 S.Ct. 1920; *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, 550 N.E.2d 456, 458; *Cooperman v. Univ. Surgical Assoc. Inc.* (1987), 32 Ohio St.3d 191, 199, 513 N.E.2d 288, 296; *Roe v. Hamilton Cty. Dept. of Human Serv.* (1988), 53 Ohio App.3d 120, 560 N.E.2d 238.

There is no question that Cook established the first prong of a 1983 claim. The police officers were obviously acting under color of state law when they arrested him. See *Gomez, supra.* Thus we must examine the second prong: namely, did the conduct of the police officers deprive Cook of a federally protected right?

Public officials, including police officers, who perform discretionary functions are entitled to be shielded from liability for civil damages in a 1983 claim as long as their conduct does not violate clearly established federal rights of which a reasonable person would have known. *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727, 2738. The test is an objective one. *Id.* This right is known in law as qualified immunity.

Qualified immunity in this context is a question of federal law. State law immunity has no application to a 1983 claim. *Cooperman* at 198, 513 N.E.2d at 296. Qualified immunity is a question of law, not fact, which can be properly determined by summary judgment. *Harlow, supra; Dominique v. Telb* (C.A. 6, 1987), 831 F.2d 673, 676.

Although qualified immunity is an affirmative defense, the ultimate burden is on the plaintiff to show that a defendant is not entitled to qualified immunity. *Wegener*

v. Covington (C.A. 6, 1991), 933 F.2d 390, 392. A defendant bears the initial burden of coming forward with facts to suggest that he was acting within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in the defendant's position would have clearly understood that he was under an affirmative duty to refrain from such conduct. *Id.*

We must first determine whether the police officers have met their initial burden in this case. The police officers were called to the scene in response to a specific complaint, from one of the volunteer escorts at the Sanger Center, that one of the protestors had moved onto the private property of the clinic and was screaming in the window disturbing those inside. That protestor was identified as Dennis Cook.[1]

The existence of a factual dispute about what was happening at the scene does not defeat the officers' initial burden of showing that they were acting within their discretionary authority during the incident in question. The police were summoned to the scene of a demonstration, they arrived to find a volatile situation with con-

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[1] At the trial on Cook's disorderly conduct charge, Officer Waddell testified that when he arrived at the Sanger Center, he observed Cook shoulting in a loud voice "[D]on't kill me, mom. Don't kill me, mom. They are killing babies in there." Waddell stated that Cook was no more than five feet from the windows of the Center and that he was definitely on Sanger Center property.

Waddell told Cook to keep the noise down and called a supervisor to the scene. Cook continued the shouting and Waddell placed him under arrest for disorderly conduct. Cook sent his son to his car to get his identification and while the son was gone, Waddell testified that Cook returned to the crowd and started shouting again. The police officers placed him under arrest.

flicting reports of what was going on, they assessed the situation, and they chose a course of action. That is their job and what we, as a society, empower them to do. We thus hold that the police officers met their initial burden of showing that they were within the scope of their discretionary authority during the incident in question.

Once the police have met their initial burden, as here, the burden shifts to Cook to establish that the police officers' conduct violated a right so clearly established that any officer in the position of Waddell and Flender, measured objecitvely, would have clearly understood that they were under an affirmative duty to have refrained from such conduct. *Guerico v. Bordy* (C.A.6, 1990), 911 F.2d 1179, 1184, citing with approval *Dominique, supra,* and *Ramirez v. Webb* (C.A.6, 1987), 835 F.2d 1153, 1156. In analyzing Cook's claim, we are guided by the caveat from the United States Supreme Court that "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs* (1986), 475 U.S. at 335, 341, 106 S.Ct. 1092, 1096.

In alleging a violation of clearly established rights, a plaintiff cannot simply make broad generalizations. In *Anderson v. Creighton* (1987), 483 U.S. 635, 107 S.Ct. 3034, the Supreme Court wrote:

> The operation of this standard [referring to the objective legal reasonableness test in Harlow], however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established

> right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified immunity by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. * * * It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [citations omitted] but it is to say that in the light of pre-existing law the unlawfulness must be apparent. [Citations omitted; emphasis added to quote.]

Id. at 639-640, 107 S.Ct. at 3038-39.

From *Anderson* we glean that the plaintiff must be specific about the rights claimed to be violated in light of clearly established law. In *Anderson,* the plaintiff alleged simply that his Fourth Amendment rights were violated, and the Supreme Court held that was not good enough. See, also, *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 93, 637 N.E.2d 309, 310.

Cook has alleged violations of his rights under the First, Fourth, and Fourteenth Amendments of the

United States Constitution.[2] As pleaded, that is too generalized for Cook to prevail. See *Poe v. Haydon* (C.A.6, 1988), 853 F.2d 418, 422.

In his arguments below and to this court, Cook more narrowly discusses his First and Fourth Amendment rights within the context of reasonable time, place and manner restrictions on speech, such as picketing on the sidewalk. As he recognizes, the burden is upon him, not the police, to show that the law regarding these rights was clearly established at the time of the alleged violation, which, in this case, was April of 1986. On this point, the United States Court of Appeals for the Sixth Circuit, whose opinions we heavily rely on in this case in this area of federal law, has written:

> Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself.

Ohio Civ. Serv. Emp. Assn. v. Seiter (C.A.6, 1988), 858 F.2d 1171, 1177.

As state courts have concurrent subject-matter jurisdiction with federal courts over 1983 claims, we are also free to look at any pertinent state authority interpreting federal law in this context. *State ex rel. Carter v. Schotten, supra* at 92, 637 N.E.2d 306, 309, fn.2, citing *Cooperman, supra* at 191, 513 N.E.2d at 288.

The First Amendment has never conferred an absolute right to engage in expressive conduct whenever, wherever,

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[2]Cook also pleaded, but apparently abandoned, a claimed violation of his Fifth Amendment rights.

or in whatever manner a speaker may choose. *Cincinnati v. Thompson* (1994), 96 Ohio App.3d 7, 15, 643 N.E.2d 1157, 1163, citing *Greer v. Spock* (1976), 424 U.S. 828, 836, 96 S.Ct. 1211, 1217; *Adderly v. Florida* (1966), 385 U.S. 39, 48, 87 S.Ct. 242, 247.

Reasonable time, place, and manner regulations on the use of a public place for expressive activity is constitutionally permissible. *Grayned v. City of Rockwood* (1972), 408 U.S. 104, 92 S.Ct. 2294. In *Grayned,* the court upheld that part of a city anti-noise ordinance prohibiting a person, while on grounds adjacent to a building in which a school is in session, from willfully making a noise or diversion that disturbs the peace and order of the school session. Further, in 1977 and 1978, the United States Supreme Court recognized the legitimacy of noise control around hospitals and medical facilities during surgery and recovery periods. *Beth Israel Hospital Inc. v. NLRB* (1978), 437 U.S. 483, 98 S.Ct. 2463; *NLRB v. Baptist Hospital, Inc.* (1978), 442 U.S. 773, 99 S.Ct. 2598.

At best, Cook would have this court accept the proposition that in April 1986, he had an absolute right to engage in any kind of expressive conduct or speech around an abortion clinic, as long as he stayed on the sidewalk. He cites no clearly established law for this proposition and it is his burden in a 1983 claim to do so. To the contrary, the "contours of the law" in this contentious area were not clearly settled until 1994 in *Madsen v. Women's Health Ctr., Inc.* (1994), ___ U.S. ___ , 114 S.Ct. 2516. Thus, Cook's claims that in April of 1986, two police officers acting under color of law violated his clearly established federal rights under the First and Fourth Amendments must fail. The police officers were entitled to qualified immunity, and sum-

mary judgment was properly granted to Flender and Waddell on Cook's 1983 claims.

As to the Fourteenth Amendment claims of Cook and his children,[3] he argues that the conduct of the defendants was "a conscience-shocking abuse of police power, thereby violating the substantive component of the [D]ue [P]rocess [C]lause of the Fourteenth Amendment * * *." In support of this contention, Cook cites one case from the United States Court of Appeals for the Seventh Circuit to prove clearly established law as of April 5, 1986, on this issue.

As stated above, the United States Court of Appeals for the Sixth Circuit has stated that a district court must find binding precedent through the cases of the Supreme Court, its court of appeals or itself. Further, it stated that:

> * * * a mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit.

Ohio Civ. Serv. Empl Assn., supra at 1177.[4] We thus hold Cook has failed to establish clearly existing law on this issue, as well as on his First and Fourth Amendment claims. The United States Supreme Court has stated that "unless the plaintiff's allegations state a claim of viola-

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[3]While it is not completely clear whether Cook is bringing the claims of his children on their behalf or whether the claims are the parents' claims as to the children, we will interpret the claims as being brought on behalf of the children.

[4]In *Eugene D. v. Karman* (C.A.6, 1989), 889 F.2d 701, 708, the Court of Appeals for the Sixth Circuit wrote that "* * * our court will not be easily swayed by the decisions of circuit and district courts other than our own when determining whether a constitutional right has been clearly established in this circuit."

tion of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S.Ct. 2806, 2815. Consequently, the trial court did not err in granting summary judgment to police officers Flender and Waddell. Cook's first assignment of error is overruled.

Turning now to the 1983 claims against the city, we note first that the parties agree that the trial court was incorrect in its reason for finding in favor of the city on this issue. Municipalities are not entitled to a qualified immunity defense in a 1983 claim. *Monell v. New York City Dept. of Social Services* (1978), 436 U.S. 658, 98 S.Ct. 2018; *Owen v. City of Independence* (1980), 445 U.S. 622, 100 S.Ct. 1398. Municipalities may be liable for damages under Section 1983 when a deprivation of federal rights results specifically from a city policy or custom. *Monell, supra; Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115; *Nungester v. Cincinnati* (Jan. 31, 1995), Hamilton App. No. C-930771, unreported. Since Cook failed to establish any violation of his constitutional rights by the police officers, there is no basis on which to find a Section 1983 violation by the city. Accordingly, the trial court properly granted summary judgment to the city, even if for the wrong reason. A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof. *State ex rel. Carter, supra* at 92, 637 N.E.2d at 309. Cook's third assignment of error is overruled.

In his second assignment of error, Cook argues that the trial court erred by granting summary judgment to Officers Flender and Waddell with respect to his state tort claims which are set forth in the third, fourth,

fifth and sixth counts.[5] Cook asserts that the officers are not subject to immunity under R.C. Chapter 2744,[6] that the evidence showed that the officers acted with malicious purpose and bad faith or in a wanton or reckless manner, and that he has provided evidence to establish the elements of the state tort claims. We are not persuaded.

The employees of a political subdivision are immune from liability pursuant to R.C. 2744.03(A)(6) unless the employee's acts or omissions "were with malicious purpose, in bad faith, or in a wanton or reckless manner." In other words, the Ohio legislature has determined that a police officer, for example, cannot be held personally liable for acts committed while carrying out his or her official duties unless one of the exceptions to immunity is established. We therefore begin with a presumption of immunity.

In *Cole v. Crowthers* (Oct. 12, 1994), Hamilton App. No. C-930767, unreported, we discussed these exceptions to immunity. "Malice" is the willful and intentional

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[5]The trial court found the police officers, acting on behalf of the city, were immune on the state tort claims. While it is not clear whether the Cooks also alleged any tort claims against the city itself, no error is assigned as to any immunity ruling in favor of the city. We thus consider the state tort claims to be alleged solely against the police officers as employees of the city.

[6]We agree with the Cooks that the trial court relied on the wrong provision of R.C. Chapter 2744 in granting immunity to the officers. R.C. 2744.03(A)(6)(b) covers the issue of immunity of individual employees. *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, 35. Nevertheless, as stated *supra*, the trial court can be right for the wrong reason. *State ex rel. Carter, supra.* As none of the exceptions to immunity listed in R.C. 2744.03(A)(6) has been established, the officers were entitled to immunity.

design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified. See, also, *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 602 N.E.2d 363. "Bad faith" involves a dishonest purpose, conscious wrongdoing, the breach of a known duty through some ulterior motive or ill will, as in the nature of fraud, or an actual intent to mislead or deceive another. *Jackson, supra.*

In *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, 35, the court examined the standard that it is has used to demonstrate wanton misconduct, stating that wanton misconduct is the failure to exercise any care whatsoever, citing to *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 363 N.E.2d 367, syllabus. The court went on to state that "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." *Fabrey, supra,* citing to *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 269 N.E.2d 420, 422. Such perversity must be under such conditions that the actor must be conscious that his conduct will, in all likelihood, result in an injury. *Fabrey, supra.*

When a motion for summary judgment is made, the burden of showing that there is no genuine issue of material facts rests with the moving party. To meet that burden, the moving party is not obligated to negate every claim of the non-moving party, but it must demonstrate the basis of its assertion that there is no genuine issue of fact. *Mitself v. Wheeler* (1988), 38 Ohio St.3d 112, 114, 526 N.E.2d 798, 801.

In turn, to overcome a motion for summary judgment, the nonmoving party must demonstrate the existence of a factual dispute and must produce evidence on any issue

for which that party bears the burden of production at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 324, 106 S.Ct. 2548, 2554 (adopted by the Ohio Supreme Court in *Wing v. Anchor Media, Ltd. of Texas* [1991], 59 Ohio St.3d 108, 470 N.E.2d 1095, paragraph three of the syllabus). The Cooks have simply not met this burden. The mere fact that the disorderly conduct charge was later dismissed by the trial court does not make the arrest unlawful, nor is it enough to transform the officers' conduct into action which was malicious, wanton, reckless, or in bad faith. Even if we were to conclude that the officers were negligent in their actions, which this record does not demonstrate, the General Assembly has declared that mere negligence should not give rise to personal liability. See *Fabrey, supra* at 357, 639 N.E.2d at 36.

We hold that Cook has not produced sufficient evidence on the state tort claims to rebut the presumption of immunity. Consequently, the trial court correctly granted summary judgment to the police officers on all the state tort claims. The second assignment of error is overruled.

Moreover, because we hold that Cook's claims fail, his wife's claim for loss of consortium must fail also.

The judgment of the trial court is affirmed.

HILDEBRANDT, P.J. and DOAN, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX D

[Entered NOV 2 1993]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8702588

(Judge Morrissey)

DENNIS J. COOK, et al.,

Plaintiffs,

vs.

CITY OF CINCINNATI, et al.,

Defendants.

FINAL JUDGMENT ENTRY

This matter came on for hearing on July 10, 1993 upon the Motion of Defendants City of Cincinnati, David Waddell and Ronald Flender for Summary Judgment. Memoranda in support of and in opposition to such Motion have been filed by the parties, as well as various other motions, responses, affidavits and replies addressing issues both directly and indirectly relating to the original Motion for Summary Judgment. The Court has considered all pleadings in the record. On July 10, 1993, a hearing was held before this Court at which time the parties presented their respective positions on such Motion. Also before the Court was Plaintiff's Motion to Strike the Sworn Statement of Debra Lee Jackson From the Record, filed June 10, 1993.

Subsequent to the oral arguments on the Motion for Summary Judgment, but prior to the Court's final review of all materials before announcing its granting of the Motion, defendants filed the Affidavit of Debra Lee Jackson, which included the original transcript of the sworn statement of the affiant which was taken on April 7, 1993 and which was attached to and referenced in defendants' April 9, 1993 Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment. Plaintiffs subsequently filed a second Motion To Strike. In light of the earlier determinations made by the Court[,] [b]oth of plaintiffs' Motions to Strike the Sworn Statement and the Affidavit of Debra Lee Jackson are OVERRULED.

Based upon a full review of all of the pleadings, memoranda and all relevant attachments, including affidavits, and the oral arguments of counsel, the Court finds that defendant police officers, who are being sued under 42 U.S.C., Section 1983 as alleged in the first and second causes of action in the Amended Complaint, are qualifiedly immune herein since their actions relating to the constitutional claims asserted by plaintiffs were taken while acting in their official capacities as Cincinnati police officers and did not constitute violations of clearly established law on the date those actions were taken. Resolution of this issue is purely a matter of law for determination by the Court and cannot be characterized as a disputed factual issue. *Dominique v. Telb,* 83 F.3d 673, 677 (6th Cir. 1987). For the same reasons, the Court finds that the actions of defendants City of Cincinnati, Flender and Waddell, as alleged in the seventh cause of action in the Amended Complaint, do not rise to the level of constitutional violations.

Based upon the same review set forth above, with respect to the alleged state tort claims and related claims

for intentional infliction of emotional distress and loss of consortium, the Court finds that Revised Code Sections 2744.02 and 2744.03 bar the plaintiffs' claims for the alleged tortious acts arising under state law, since it is undisputed that the actions taken by defendant police officers, on behalf of defendant city, were actions taken during the provision of police services and amounted to a governmental function.

For the reasons stated above, the Court finds that all Defendants are entitled to judgment as a matter of law with respect to all claims raised in the Amended Complaint.

IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment is hereby GRANTED, defendants City of Cincinnati, David Waddell and Ronald Flender are hereby DISMISSED WITH PREJUDICE from this case, and the pending action is DISMISSED at plaintiffs' costs.

/s/ Wm. J. Morrissey
JUDGE

Have Seen/All issues reserved for appeal.

/s/ Thomas W. Condit
Thomas W. Condit C-567/0041299
Attorney for Plaintiffs

Julie F. Bissinger B-735/0012055
Attorney for Defendant City of Cincinnati

/s/ Donald E. Hardin
Donald E. Hardin H-020/0022095
Special Counsel for Defendants David Waddell
and Ronald Flender

APPENDIX E

AFFIDAVIT OF DENNIS COOK

STATE OF OHIO)
)ss
COUNTY OF HAMILTON)

Now comes Affiant, Dennis Cook, being first duly cautioned and sworn, deposes and says:

1. On April 5, 1986, I was protesting and speaking out against abortion on the public sidewalk in front of the Margaret Sanger Center ("Sanger"), an abortion center then operated by Planned Parenthood Association of Cincinnati. Sanger was located at 3332 Vine Street in Cincinnati, Ohio, a heavily travelled, noisy business section of town.

2. It had been my regular practice to protest at Sanger most Saturday mornings dating back to January 1986, and like many other protestors, I frequently took one or more of my children with me to witness and participate in the protests in front of Sanger. On April 5, 1986, I took my son, Jeffrey, and my step-daughter, Jennifer Rose Smith, ages 10 and 11 respectively at that time.

3. Approximately 50 to 100 other protestors were present at Sanger on April 5, 1986. At all times during my protest activities that day, I remained on the public sidewalk. Never once did I walk onto the Sanger property until I was instructed to approach the police officers who had arrived.

4. On April 5, 1986, my conduct at Sanger was limited to speaking out against abortion and trying to persuade mothers going into Sanger not to have abortions. I would characterize the manner of my speech and the tone of my voice as that of "street preaching" and at no time did I

scream at the top of my lungs or in an unreasonable manner. I did, however, hope that women entering Sanger or sitting in Sanger's reception room might hear my remarks and be motivated against having an abortion.

5. At approximately 10:00 a.m., City of Cincinnati Police Officers Ronald Flender and David Waddell arrived on the scene, one or both of whom told me that they would give me a citation if I did not shut up. I was also holding a three inch plastic model of a human fetus, and I was displaying it while the police officers were talking to me. However, I never "shoved" the fetus into either of the police officers' faces nor did I act aggressively toward them or provoke them in any way.

6. As women passed by, I continued to speak out against abortion, believing that I was perfectly within my rights to do so. I was ultimately arrested and handcuffed by Officers Ronald Flender and David Waddell.

7. Immediately upon being arrested, as I was led to a police cruiser, I informed Flender and Waddell that I had two small children with me, and I pleaded with them not to leave my children there alone. One of the officers responded that the children were my problem and they made no effort whatsoever to honor my request. I was transported by one of the officers to the District Four police station and then to the Hamilton County Justice Center, where I was incarcerated for over three hours, all the while not knowing who was caring for my children or whether they would safely get home, which was approximately six miles away.

8. Only after being released from jail later that afternoon did I know for sure that my children had made it home safely.

9. My assessment of the conduct displayed by the two City Police Officers who arrested me on April 5, 1986 and abandoned my children is that it was totally unreasonable, vindictive, malicious, unnecessary and irrational.

10. Subsequent to my arrest, Officer Waddell filed a criminal charge against me for disorderly conduct. I was tried before Hamilton County Municipal Court Judge Joseph Luebbers on or about August 26, 1986 and I was acquitted of the charge of disorderly conduct, which constituted the final disposition of said charge.

11. As a direct result of my arrest on April 5, 1986, I suffered great humiliation and emotional distress, and it adversely affected my family life and my relations with my wife for weeks to come. It also created stress and brought criticism from the grandmothers of my children for my picketing activites and the incident to which Jennifer and Jeffrey were subjected. It also chilled my desire to return to Sanger, and I broke my habit of weekly picketing and did not return there for at least six weeks.

Further Affiant saith naught.

/s/ Dennis J. Cook
Dennis Cook

Sworn to before me and subscribed in my presence this 21st day of January, 1993.

/s/ Thomas W. Condit
Notary Public